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BRIEFS

Nos. 17-71 and 17-74

In the
Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,
v.
UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,
Respondents.
MARKLE INTERESTS, LLC, ET AL.,
Petitioners,
v.
UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,
Respondents.

On Petitions for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF ALABAMA AND 17 ADDITIONAL STATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This amicus brief addresses the following two questions presented:

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

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INTEREST OF *AMICI CURIAE*[1]

The *amici* States are deeply concerned that the Fifth Circuit's expansive reading of the Endangered Species Act strips the statute of the express limitations that Congress imposed on the United States Fish and Wildlife Service with regard to the designation of "critical habitat." Last year, eighteen States, including these *amici*, challenged two new rules that expressly authorized the unlawful method of critical-habitat designation the Service followed in this case. *See Alabama ex rel. Strange v. Nat'l Marine Fisheries Serv.*, No. 16-cv-593 (S.D. Ala.).

Even if those new rules are repealed, the Fifth Circuit's expansive reading of the existing rules and statute will impose significant costs on the States. Critical habitat determinations have serious consequences for the economic and ecological interests of the States. Designations of critical habitat that go beyond what the statute allows cost jobs and tax revenue, while the States' efforts to comply with these designations often require the expenditure of taxpayer funds.

The States have a profound interest in maintaining the delicate balance Congress struck in the ESA between ensuring the recovery of listed species and protecting the private property rights of citizens and the sovereign interests of the States. The opinion of the Fifth Circuit upsets that balance, and this Court should grant the petition as a result.

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[1] Consistent with Rule 37.2(a), the *amici* States provided notice to the parties' attorneys more than ten days in advance of filing.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision on review in cases No. 17-71 and No. 17-74 raises questions of exceptional importance and is inconsistent with both the statutory text and the Court's precedent. Over a strong dissent by Judge Owen, the Fifth Circuit upheld a designation of land that was unoccupied and uninhabitable by the dusky gopher frog as a "critical habitat" for that frog. That circuit denied rehearing en banc over a dissent by six judges who contended that the panel's decision violated the statute and that "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." Weyerhaeuser Pet. App. 126a. The Court should grant the petition and reverse this expansive and costly decision.

The Court should grant the petitions in these two cases for three reasons. First, contrary to the plain language of the Endangered Species Act, the Fifth Circuit's "unprecedented and sweeping" decision would allow the Government to declare land "essential" to the conservation of a species even if that land is not and may never be habitable by that species. Weyerhaeuser Pet. App. 50a. Second, contrary to the Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997), the Fifth Circuit declared certain critical habitat findings immune from judicial review. Third, the Service's designation could impose up to $34 million costs on landowners while providing only speculative conservation benefits. Weyerhaeuser Pet. App. 129a (citing 77 Fed. Reg. at 35,140).

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's expansive definition of the word "essential" ignores the plain text of the Endangered Species Act.

The Fifth Circuit's decision gives the United States Fish and Wildlife Service unfettered reign to declare areas that are unsuitable for endangered species nevertheless "essential" to their conservation.

The plain text of the Endangered Species Act imposes more stringent requirements on the designation of unoccupied land as critical habitat than on the designation of occupied land. That act defines critical habitat as areas occupied by the species "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532 (5)(A)(i). Unoccupied areas trigger an additional requirement—the Secretary must determine that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). As other courts have noted, the statute imposes "a more onerous procedure on the designation of unoccupied areas." *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

The Fifth Circuit's decision flips this reasoning on its head. Rather than reading "essential for the conservation of the species" as an additional

requirement, the Fifth Circuit lowered the bar for designating unoccupied habitat. If the Secretary finds occupied areas are insufficient for conservation, he may designate any unoccupied area as critical habitat, regardless of whether the area is or ever will be habitable by the species. Under the Fifth Circuit's reasoning, although the Secretary must show that areas *where the species is present* have all physical and biological features essential to conservation, no such showing is required for unoccupied lands. *See* Weyerhaeuser Pet. App. 23a.

Thus, the panel's decision strips the word "essential" of all meaning, declaring habitat essential to conservation even if a species would immediately die if moved there. A desert could be critical habitat for a fish, a barren, rocky field critical habitat for an alligator. As Judge Owen noted in her dissent from the panel's decision, this "interpretation of 'essential' means that virtually any part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Weyerhaeuser Pet. App. 54a.

II. The Fifth Circuit's holding that habitat exclusion decisions are nonreviewable contradicts *Bennett v. Spear*.

The Fifth Circuit also erred in declaring certain critical habitat decisions immune from judicial challenge. Congress, recognizing the significant economic and environmental impacts critical habitat designations entail, amended the Endangered Species

Act to include a mandatory cost-benefit analysis of critical habitat decisions:

> The Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2).

The panel found these decisions nonreviewable because the Administrative Procedure Act forbids judicial review of choices "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The panel explained, "[Section 1533(b)(2)] establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation."

Weyerhaeuser Pet. App. 35a (citing *Bear Valley Mut. Water Co.*, 790 F.3d at 989).

But the Court has rejected that argument. In *Bennett v. Spear*. 520 U.S. 154 (1997), the Court held that § 1533(b)(2) decisions are not immune from judicial review. *Bennett* involved the Endangered Species Act's citizen-suit provision. Like the Administrative Procedure Act, it precludes challenges to decisions that are "discretionary with the Secretary." 16 U.S.C. § 1540(g)(1)(C). In *Bennett*, the Government sought to dismiss the underlying action on the basis that the duties of § 1533(b)(2) are discretionary and thus nonreviewable. 520 U.S. at 172. The Court rejected that argument: "[T]he terms of § 1533(b)(2) are plainly those of obligation rather than discretion . . . ." *Id.*

The Court found Section 1533(b)(2) decisions reviewable, notwithstanding the discretion granted by the "may" clause. The Court explained, "[T]he fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C. § 1533 (b)(2)). On this point the Court was emphatic: "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Id.* (citing *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 94–95 (1943)); *see also Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) (explaining that the use of "a permissive term such as 'may' rather than a mandatory term such as

'shall,' . . . suggests that Congress intends to confer some discretion on the agency, and that courts should accordingly show *deference* to the agency's determination" but that "such language does not mean the matter is *committed* exclusively to agency discretion."). Thus, the Court concluded that a "§ 1533 claim is reviewable." *Bennett*, 520 U.S. at 172.

The lower court did not examine the reviewability question in light of *Bennett*, mentioning the case only once in passing. The Fifth Circuit's failure to conduct any kind of searching inquiry into the application of *Bennett* to this case underscores the need for the Court's review. The decision to designate critical habitat and the decision to exclude certain areas from that designation have far-reaching implications. In both instances, the Secretary is exercising the coercive power of the government over private property. When the Secretary abuses her discretion, the courts must have the power to correct that overreach.

In refusing even to consider whether the Secretary overreached, the panel relied on the Court's decision in *Heckler v. Chaney*, the leading case on nonreviewability. 470 U.S. 821 (1985). In finding nonreviewable an agency's decision not to employ its prosecutorial powers, the *Heckler* Court noted that an agency "generally does not exercise its coercive power . . . and thus does not infringe upon areas that courts often are called upon to protect" when it refuses to act. *Id.* at 832. But when the Secretary refuses to exclude areas from a critical habitat designation, she is not refusing to act in the sense used by the *Heckler* Court. Rather, she is exercising her coercive power to the fullest. When she does so, her action touches upon the most basic property rights of those within the

critical habitat designation. Although the Endangered Species Act is "a noble effort," it is one that has "the ability to ruin individuals' lives . . . [M]ost Americans do not realize that hundreds of thousands of rural citizens face the potential loss of their livelihoods stemming from FWS designations of [critical habitat] under the ESA." Matthew Groban, *Arizona Cattle Growers' Association v. Salazar: Does the Endangered Species Act Really Give A Hoot About the Public Interest It "Claims" to Protect?*, 22 VILL. ENVTL. L.J. 259, 279 (2011). It also has costs for the States, both in reduced tax revenue and jobs lost. *See* Reid Wilson, *Western States Worry Decision On Bird's Fate Could Cost Billions In Development*, WASH. POST (May 11, 2014).[2]

The Secretary cannot ignore these costs or impose them without a commensurate benefit. As the Court has found, it is inherently irrational "to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. Envtl. Prot. Agency*, 135 S. Ct. 2699, 2701 (2015). The decision of the Fifth Circuit allows the Secretary to do just that, with no recourse to the courts.

III. Critical-habitat designations have significant financial effects on States and private parties.

Even when critical-habitat designations benefit a species, they also come with a cost. "Consideration of cost reflects the understanding that reasonable

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[2] https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/11/western-states-worry-decision-on-birds-fate-could-cost-billions-in-development/.

regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan*, 135 S. Ct. at 2707. In the context of the Endangered Species Act, it is beyond dispute that "[c]onsiderable regulatory burdens and corresponding economic costs are borne by landowners, companies, state and local governments, and other entities as a result of critical habitat designation." Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation A Comment on Critical Habitat and the Challenge of Regulating Small Harms*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10678, 10680 (2013). For example, the Court's first major decision examining that act, *Tennessee Valley Authority v. Hill*, resulted in the suspension of a dam-building project that was 80 percent complete and for which Congress had spent more than $100 million of taxpayer money. 437 U.S. 153, 172 (1978).

It was a harbinger of things to come. Critical habitat designations, by their very nature, limit human activity. That limitation almost always results in a lost economic opportunity. The impact ripples through the economy; in an average industry, every billion dollars in regulatory costs results in a loss of over 8,000 jobs. Sam Batkins & Ben Gitis, *The Cumulative Impact of Regulatory Cost Burdens on Employment*, AM. ACTION FORUM (May 8, 2014).[3] As a consequence, States also suffer a subsequent loss of tax revenue, both as a result of reduced employment as well as foreclosed industrial and recreational use of areas designated critical habitat. For instance,

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[3] http://www.americanactionforum.org/research/the-cumulative-impact-of-regulatory-cost-burdens-on-employment/.

proposals to conserve the sage grouse "could cost up to 31,000 jobs, up to $5.6 billion in annual economic activity and more than $262 million in lost state and local revenue every year . . . ." Reid Wilson, *Western States Worry Decision On Bird's Fate Could Cost Billions In Development*, WASH. POST (May 11, 2014).[4] And, in the case below, as Judge Jones observed in her dissent from denial of rehearing en banc, "One shocking fact is that the landowners could suffer up to $34 million in economic impact. Another shocking fact is that there is virtually noting on the other side of the economic ledger." Weyerhaeuser Pet. App. 158a (citation omitted). Not to mention, it is uncontested that the dusky gopher frog could not survive in Unit 1—its "critical habitat." *See* Weyerhaeuser Pet. App. 23a. Thus, there are only—at most—speculative conservation benefits to this designation.

While the ESA may certainly require sacrifices in order to preserve endangered species, the decision to impose those costs on States and the public must conform with the requirements of the statute. That did not happen here.

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[4]https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/11/western-states-worry-decision-on-birds-fate-could-cost-billions-in-development/.

CONCLUSION

The Court should grant certiorari and reverse the court of appeals.

Respectfully submitted,

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